COMMENTS OF THE ST. REGIS MOHAWK TRIBE ON THE PROPOSED WORK PLAN FOR THE STUDY OF ENERGY RIGHTS OF WAY ON TRIBAL LANDS MANDATED BY SECTION 1813 OF THE ENERGY POLICY ACT OF 2005; COMMENTS ON THE *FEDERAL REGISTER* NOTICE OF DECEMBER 29, 2005.

The St. Regis Mohawk Tribe offers comments on the work plan that has been proposed by the Departments of Interior and Energy for conducting the study of energy rights-of-way on tribal lands, as mandated by section 1813 of the Energy Policy Act of 2005 as requested in the Tribal Leader letter we received and in the *Federal Register* notice dated Dec. 29, 2005 (70 Fed. Reg. 77178).

Our Tribe is very interested in this study. We are currently in negotiations with an electric utility over rights-of-way on our lands. Originally entered into in 1949, the utility obtained a 99-year right of way without Secretarial approval for the sum of $1.00. This illegal right of way is part of the Tribe's pending land claim. In the current renegotiations, the company continues to offer no compensation whatsoever for the use of the land and refuses to consent to any form of tribal jurisdiction. Thus, from our perspective, the subject rights-of-way over tribal lands raises a number of important issues. Some of the issues warrant attention from Congress. We are concerned, however, that the proposed work plan set out in the *Federal Register* notice will result in a report that will be seriously flawed.

As provided in section 1813 of the statute, the study is supposed to include findings on four topics:

(1) an analysis of historic rates of compensation paid for energy rights-of-way on tribal land;

(2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;

(3) an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land; and

(4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.

GENERAL COMMENTS

The four aspects of the report are interrelated and that interrelationship will impact the final result. For example, in performing the historical analysis the agency should include some comparisons to the grants of rights-of-way for similar purposes over lands that are not held in trust or restricted status. An appropriate comparison would be to value compensation obtained by non-Indian governments through taxation and fees. This sort of comparison takes into account the sovereign status of tribes, not just the market value of land which could be taken by eminent domain from a private landowner.

Once made, the recommendations for standards for fair and appropriate compensation would utilize those comparisons and also take into account the governmental functions that tribes continue to carry out on rights-of-way.

In addition, an assessment of the tribal self-determination and sovereignty interests in this report should acknowledge case law of the past decade, including the U.S. Supreme Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and more recent decisions by lower federal courts treating certain kinds of rights-of-way on

tribal land as fee land for jurisdictional purposes. These case decisions have had the practical effect of making the requirement under federal law for tribal consent a key factor in the exercise of tribal sovereignty within rights-of-way. Moreover, energy facilities such as pipelines and transmission lines have risks associated with them, and state and local governments may use their powers of taxation and regulation to limit these risks and to be prepared to respond to emergencies. In the wake of recent case law, the authority of tribal governments to regulate and tax such rights-of-way may be challenged in court. We believe that many of these recent cases reflect federal Indian policies that were repudiated long ago, and that a well-written and carefully researched report to Congress could be part of a foundation for legislation to bring the holdings of these cases more into line with the modern federal policy supporting tribal self-determination and self-governance. In light of these sovereignty implications, it is critically important that there is genuine and meaningful consultation with tribal leaders in conducting this study.

The fourth topic of the study, an analysis of relevant national energy transportation policies, appears to address the issue of the tribal consent requirement under current law and whether there are any historical examples of the use of the tribal consent requirement, or the exercise of tribal sovereignty, in a way that has created an impediment to the transportation of energy resources.

This issue is not new. In response to similar concerns raised by energy companies in the late 1960s, the Secretary of the Interior had proposed changing the regulations to eliminate the requirement for tribal consent with respect to tribes that were not organized under the Indian Reorganization Act of 1934. In a report issued by the House Committee on Government Operations, captioned “Disposal of Rights in Indian Tribal Lands without

Tribal Consent." H.R. Rep. No. 91-78 (1st Sess., March 13, 1969) (herein "1969 House Report"), the Committee examined that proposal and rejected it, finding the basis for the stated change baseless. The Committee found that:

1. Tribal land is the property of Indian tribes and not the United States.

2. The grant of right of way without tribal consent "violated property rights, democratic principles, and the pattern of modern Indian legislation." Report, p. 3. See also p. 6.

3. "Those requiring rights of way over tribal lands have encountered no particular problems in obtaining Indian consent" and "no case comes to mind where a state or local project has been frustrated or seriously held up by the lack of power to condemn tribal land." Report, p. 11 quoting the Secretary of Interior letter of January 27, 1968.

In response to objections raised by Members of Congress at that time, the Secretary dropped the proposal to change the regulations. It is our belief that these findings will hold true today and we hope that any suggestion that the Secretary be granted the right to consent to rights-of-way, without tribal consent be rejected once again. This report is powerful evidence that historically tribes have been honorable in their dealings with those requesting rights of way. In our experience, the companies are suspect.

These issues are of great significance to tribes and we are concerned that the one-year time frame specified in section 1813 of the 2005 Energy Policy Act (of which about six months remain) is simply not enough time to conduct this study in the way that it should be done. We recommend that, after consultation with tribal governments, DOI

and DOE ask Congress for a sufficient extension of the deadline so that the study can be done right.

Given that the four topics of the study are interrelated, we also have doubts about the usefulness of contracting out discreet parts of the project, although we also recognize that neither DOI nor DOE has sufficient staff to conduct this study entirely in-house. If DOI and DOE determine that it is advisable to conduct parts of this study through a contract, we recommend that a contractor be selected that has extensive experience in working with Indian tribes and nations.

SPECIFIC COMMENTS

1. DOI and DOE propose to contract with a Department of Energy National Laboratory to prepare an analysis of historical rates of compensation for pipelines crossing Indian land (as specified in section 1813(b)(1)), using a case study approach.

Preliminarily, we note two issues regarding the interpretation of Section 1813 in the Federal Register Notice.

First, the scope of the term "energy rights-of-way" must be defined. The statutory language calls for "an analysis of historic rates of compensation paid for energy rights-of-way on tribal lands" not "pipelines crossing Indian lands" as stated in the *Federal Register* notice. We are aware that section 1813 was enacted as a response to lobbying by the oil and gas industry, more particularly, by companies with natural gas pipeline rights of way over tribal lands. The statutory language, however, uses the term "energy rights-of-way," a term that is not defined in the statute. While there may be some doubt about just how broadly Congress intended this term to be used, it seems apparent that it

was not intended to be limited to pipelines. We assume that Congress intended the term to include rights-of-way for energy facilities such as electric transmission lines and probably also for electric distribution lines.

A second mistake in language quoted above from the *Federal Register* notice is the use of the term "Indian land." Section 1813 of the statute uses the term "tribal land," and it refers to section 503 of the Act for a definition of this term. As defined in that section, the term "tribal land" means "any land or interests in land owned by any Indian tribe, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States." Codified at 25 U.S.C. §2602(12). The term "Indian land," as defined in the statute, is much broader in coverage, and includes "all lands within the boundaries of an Indian reservation" as well as any lands "not located within the boundaries of an Indian reservation" if the title is held in trust for a tribe or individual Indian or held by a tribe or individual Indian subject to a restriction against alienation. Codified at 25 U.S.C.§2601(2). Thus, Congress apparently intends for this study to focus on rights-of-way on trust or restricted lands owned by tribal governments, *not* lands owned by individual Indians. This distinction is important since in determining the appropriate standards for compensation to tribes, the study must consider the interests of tribes as governments, not just as landowners.

In addition, we think that this proposed approach is flawed in two ways: (a) the use of a national energy laboratory, and (b) the use of a case study approach.

(a) The proposed use of a national energy laboratory. For an analysis of historic rates of compensation paid to tribes to be meaningful, it must be informed by knowledge of the history of federal Indian law and policy. We doubt that any of the

national energy laboratories has staff with this background. There is a long history of rights-of-way having been granted over tribal lands in ways that have not adequately assessed the value of tribal lands and that have not appropriately taken into account the interests of tribes as sovereign governments. The generally applicable statute for rights of way over tribal lands was enacted in 1948. Act of Feb. 5, 1948, 62 Stat. 17 (codified at 25 U.S.C. §§ 323 – 328).[1] Under this statute (and others still on the books) the Secretary has the power to grant rights-of-way, and generally does so through the Bureau of Indian Affairs (BIA).

The statute makes tribal consent a requirement for tribes organized under the Indian Reorganization Act, and this requirement has long been made applicable to all other tribes through regulations issued by the Secretary of Interior. Despite the requirement for tribal consent, many rights-of-way were granted for less than adequate compensation, for a variety of reasons, such as unequal bargaining power, failure of the BIA to live up to its trust responsibilities to tribes, and lack of access to legal counsel. In addition, many rights-of-way were granted during the 1950s, which was the "termination" era of federal Indian policy, a time when federal policy promoted the assimilation of tribes into mainstream America and assumed that tribes as governments were not permanent institutions.

For the section 1813 study to be useful to Congress, it must be informed by this history of federal Indian law and policy. We do not believe that any of the national energy laboratories has the necessary expertise. There are, however, other institutions

[1] Prior to 1948, rights of way over tribal and individual Indian lands were authorized by a hodge-podge of statutes, the first of which was enacted in 1899. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §15.09[4] (2005 ed.).

that do have a record of working with tribal governments, and which do have expertise in federal Indian law and policy. Some such institutions are affiliated with academic institutions.

(b) The use of a case study approach. We do not have comprehensive information, but we suspect that there must be thousands of rights-of-way on tribal lands for energy-related facilities. Without an effort to compile data on the complete set of such rights-of-way, a case study approach will not be representative and, as such, will be fundamentally flawed. We suspect that there is a great deal of variation in the thousands of rights-of-way. As an example of one end of the spectrum, our Tribe entered into an agreement in 1949 with an electric utility company which included a right-of-way for electric distribution lines, for a 99-year term. This agreement is unlawful on its face for lack of Secretarial approval and for exceeding the 50-year term that was allowed when the right-of-way was granted. In addition, the compensation for this right-of-way was the nominal amount of one dollar.

We do not know the extent to which other tribes entered into similar agreements, but expect that a reasonable effort to gather data will find that a great many rights-of-way were granted for minimal compensation, probably on the assumption that the tribal community would receive benefits from allowing the grantee of the right-of-way the use of tribal lands. In more recent times, we would expect that many tribes have negotiated much more favorable arrangements in granting or renewing rights-of-way. Our point is that, unless there is a major effort to gather information about the thousands of rights-of-way over tribal lands, we will not know what the other end of the spectrum is or what the

distribution is along the spectrum, and so a case study approach will not be based on a sample that can be shown to be representative.

2. A national 2-day scoping meeting with representatives of all affected groups, at which several working groups would be established.

While we do not object to the establishment of working groups, we believe that the proposal to establish working groups renders applicable the Federal Advisory Committee Act (FACA). 5 U.S.C. Appendix. Such working groups would be "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for … one or more agencies or officers of the Federal Government." 5 U.S.C. App. §3(2)(C). There is no act of Congress that specifically exempts the proposed working groups from FACA. Id. §4(a). Assuming that FACA does apply, then failure to comply may jeopardize the usefulness of the study. *See Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103 (11th Cir. 1994) (enjoining the agency from using a report tainted by a FACA violation; *cf. California Forestry Assn. v. Forest Service*, 102 F.3d 609 (D.C. Cir. 1996) (declining to issue such injunctive relief but not ruling out the possibility of such relief if necessary to avoid rendering FACA a nullity). Proceeding under FACA would clearly be useful to coordinate input from, and discussion among, tribal leaders and others with an interest in the study. The alternatives would seem to be for DOI and DOE to do the study in-house and/or through the use of one or more contractors, and we do not think that either of those approaches will be adequate or provide meaningful tribal input.

We support the idea of a scoping meeting, although it is likely that limiting it to a single two-day event will result in leaving out many people who want to be involved,

especially tribal leaders. We recommend that the scoping process be planned with a view to facilitating the involvement of tribal leaders.

4. DOI and DOE will conduct up to two workshops for each of these working groups between February and March.

If FACA applies, the process of issuing a charter and making appointments would impinge on the proposed schedule. The meetings could not be accomplished in that time frame. More importantly, we think it would be more constructive to have the working groups have some say in establishing their own work plans. The overall time frame for the project should be established as part of the consultation with tribal leaders and representatives of affected groups.

5. DOI and DOE plan to distribute a draft report for review and comment in May 2006.

We think that a commitment to completing a report in this time frame will ensure that the report not be very useful. It will be based on inadequate data collection and, as such, the analysis in the study will be flawed. We recommend seeking an extension of time from Congress.

6. DOI and DOE will conduct three regional Tribal consultation meetings between May and mid-July 2006.

Tribal consultation after the draft report is released is essential, but we doubt that three regional meetings will be enough. The time frame and arrangements for Tribal consultation at this point in the study should take into consideration the views of the people who become involved in the working groups.

7. DOI and DOE will consider comments in preparing the final report for Congress.

DOI and DOE should commit, not just to considering comments, but also to including written comments in the report to Congress. In addition, there should be some time built into the project for consultation seeking to resolve issues before the report is submitted to Congress.